Supreme Court of the United States

OCTOBER TERM, 1942.

No. 853.

NELLIE C. BOSTWICK, JACKSONVILLE HEIGHTS IMPROVEMENT COMPANY, A FLORIDA CORPORATION, ET AL., PETITIONERS AND APPELLANTS BELOW,

VS.

BALDWIN DRAINAGE DISTRICT, C. T. BOYD, AND UNITED STATES OF AMERICA, RESPONDENTS AND APPELLEES BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

And

BRIEF IN SUPPORT THEREOF.

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To the Honorable, the Supreme Court of the United States:

Nellie C. Bostwick, a citizen of Duval County, Florida, and Jacksonville Heights Improvement Company, a Florida corporation with its principal place of business at Jacksonville, Florida, appellants below, respectively petitioning show to the Court:

SUMMARY STATEMENT OF MATTERS INVOLVED.

The government filed this suit to take 2,666 acres of land for a naval air field. The government's amended petition (R. 17 to 61) described forty-two parcels.

The petitioner, Nellie C. Bostwick, and petitioner, Jacksonville Heights Improvement Company, seek a review of the adverse decisions below with respect to their claims of title to the awards for four of these parcels, namely, Parcels 4, 5, 15 and 24. The respondent, Baldwin Drainage District, as an adverse claimant, filed an answer in the District Court (R. 61 to 73) claiming first as *lienor* for an accumulation of drainage district taxes far in excess of the awards made for said four parcels severally (R. 273) and, second, as *fee owner* of said four parcels severally, but the basis of the alleged fee ownership was not stated.

The answer of petitioners, Nellie C. Bostwick *et al.* (R. 81, 83), showed that she, Mrs. Bostwick, claimed title to Parcel 4 and the award therefor (and other lands) by virtue of a state court mortgage foreclosure decree of December, 1924, followed by a master's deed of February, 1925. The same answer (R. 85 and R. 215) also showed that the adverse claim of title by Baldwin Drainage District was based upon a federal court drainage tax foreclosure decree of December, 1928, followed by a special master's deed of March, 1931, to the Drainage District. The same answer (R. 84) showed that the petitioner, Jacksonville Heights Improvement Company, claimed title to the awards for Parcels 5, 15 and 24 (and other lands) by virtue of a deed of 1909, prior tc the formation of the Drainage District. The same answer also showed that the Drainage District claimed title to the last mentioned parcels by virtue of another federal drainage tax foreclosure decree (R. 315) of April, 1931, followed by a special master's deed in 1932 to the District.

The answer of petitioners, Bostwick and Jacksonville Heights Improvement Company *et al.,* by Sections II to XIII (R. 91 to 165) attacked the drainage tax liens claimed by the Drainage District, as applied to all parcels in which they severally were interested, on sundry grounds based on the state drainage law and based on the state and federal constitutions. The same answer by Section XIV (R. 165 to 194) attacked the validity of said federal drainage tax foreclosure decrees on numerous jurisdictional and other grounds as follows:

First. That the face of the records made in said former federal suits whereby a receiver was appointed to collect delinquent drainage taxes and made in the so-called ancillary foreclosure suits brought by the receiver, showed that when the interests and attitudes of the parties to the litigation were considered the Drainage District, a citizen of Florida, was in law aligned on the same side with the complaining coupon holder against alleged delinquent landowners, most of whom were citizens of Florida, with the result that the requisite diversity of citizenship was wanting.

Indianapolis v. *Chase National Bank,* 314 U. S. 63, 69, 86 L. Ed. 48, 50.

Second. That the answer of the Drainage District made in the former federal receivership suit and quoted R. 168 to 175, and the petition of the complaining coupon holder in that case and quoted R. 177 to 182, showed that the District wanted to do and had already done on April 15th, 1924, the same thing that the complaining coupon holder wanted done, namely, to sue certain large alleged delinquent landowners. Moreover, Sections 3, 6, 9 and 10 of said petition of the complaining coupon holder (R. 173 to 180) additionally showed that there was no "actual," "substantial" "controversy" existing or remaining between the complaining coupon holder and the Drainage District, with the result that no jurisdiction existed in the main

suit filed by the complaining coupon holder or in the so-called ancillary tax suits filed by the receiver.

Blacklock v. *Small,* 127 U. S. 96, 32 L. Ed. 70.

Boston & M., etc., Mining Co. v. *Montana Ore Purchasing Co.,* 188 U. S. 632, 643, 47 L. Ed. 629, 633.

Hamer v. *N. Y. Railways Co.,* 244 U. S. 266, 274, 61 L. Ed. 1125, 1130.

Mitchell v. *Maurer,* 293 U. S. 237, 79 L. Ed. 338, 4th headnote (L. Ed.).

Kelleam v. *Maryland Casualty Co.,* 312 U. S. 377, 85 L. Ed. 899, 2nd headnote (L. Ed.).

Third. That the only matter left in "controversy" between the complaining coupon holder and the drainage district, as appeared by the face of the records made in said former federal tax foreclosure proceedings, was merely the right of the coupon holder to have delinquent taxes collected through the instrumentality of a receiver pursuant to the remedy given by what is now Section 1493, Compiled General Laws of Florida (1927), rather than permit the Drainage District to act as plaintiff in that behalf or for the complaining coupon holder to be the plaintiff, all as provided for by what is now Section 1473, Compiled General Laws of Florida (1927). That the difference in value of such remedies, if any, was unsubstantial and insufficient to sustain federal jurisdiction.

Healy v. *Ratta,* 292 U. S. 263, 208, 270, 78 L. Ed. 1248, 1253-4.

McNutt v. *General Motors Acceptance Corp.,* 298 U. S. 178, 181, 184, 80 L. Ed. 1135, 1136, 1138.

Thomson v. *Gaskill,* 315 U. S. 442, 446, 447, 86 L. Ed. 951, 955-6.

Fourth. That by virtue of two sections of the state drainage law, namely, Sections 1473 and 1493, Compiled General Laws (1927), and by virtue of the final decrees in the receiver's tax foreclosure suits (see seventh ground of petition for rehearing) the complaining coupon holders

and the receiver were pursuing causes of action which belonged to the Drainage District and said tax foreclosure decrees quoted (R. 187-188 and R. 189-191) in express terms adjudged the awards thereof to belong to the Drainage District and that the same should be credited on its bids for the property if no one else bid the amount of the taxes adjudged together with interest, costs and other charges. Such a record made in the light of the state drainage law demonstrated that the Drainage District was at all times aligned on the same side of the litigation with the coupon holders and the receiver, thereby defeating federal jurisdiction to entertain tax foreclosure suits against Duval Cattle Company, Jacksonville Heights Improvement Company and other landowners who were citizens of Florida.

Indianapolis v. *Chase National Bank*, 314 U. S. 63, 69, 86 L. Ed. 48, 50, and cases cited in footnotes 1, 2 and 4.

Fifth. Section XV of petitioners' answer (R. 197 to 201) further showed, as to Jacksonville Heights Improvement Company, that the default tax foreclosure decree entered against it was additionally bad and not within the jurisdiction of the court because the receiver filed a bill claiming a right to collect only "instalment taxes" theretofore levied to service drainage bonds, whereas the decree as actually entered, but unknown to the District Judge, included void taxes levied for pretended "maintenance" purposes and that such void maintenance taxes constituted more than a one-sixth part of the decree.

Gage v. *Pumpelly*, 115 U. S. 454, 29 L. Ed. 449.
Reynolds v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464.

Many reasons for the invalidity of the pretended maintenance taxes are stated in Section X of petitioners' answer (R. 134 to 141).

Sixth. Section XVII of petitioners' answer (R. 201 to 210) further showed that the tax foreclosure decree entered

against Duval Cattle Company, 41 F. 2d 433, and quoted R. 187-188, was not binding on the petitioner Bostwick because she was not a party to that suit although she was since 1919 up to the date of the master's deed to her in February, 1925, a holder of mortgage bonds issued by Duval Cattle Company, and was thereafter the fee owner of Parcel 4 (and other land) for nearly four years more before the tax decree was entered against Duval Cattle Company in December, 1928. This question of parties and the question of their rights of redemption under the drainage law, were matters of state law and binding upon the federal court. See Rule 29, Florida Equity Rules, and

Griley v. *Marion Mtg. Co.*, 132 Fla. 299, 182 So. 297.

Dundee Naval Stores Co. v. *McDowell*, 65 Fla. 15, 61 So. 108.

Clark v. *Reyburn*, 8 Wall. 318, 19 L. Ed. 354.

In any event the petitioner Bostwick was not a purchaser *pendente lite* and the title she received by master's deed in February, 1925, related back to the date of the mortgage under which she held mortgage bonds, namely July, 1919.

Andrews v. *National Foundry & Pipe Works*, (7 C. C. A.) 77 Fed. 774, 36 L. R. A. 139. Certiorari denied 166 U. S. 721.

1 Freeman on Judgments (5th Ed.), Section 440, page 968.

Seventh. Section XVII-A of petitioners' said answer (R. 210-213) showed that if petitioner, Nellie C. Bostwick, was represented in the federal tax foreclosure case by the mortgage trustees provided for by the mortgage of July, 1919, joined as defendants with Duval Cattle Company, then the tax foreclosure decree was void for the further reason that said decree was obtained by fraud or mistake in that the receiver and his counsel either by design or mistake prevented said mortgage trustees from interposing good defenses to the tax suit and that the existence of

such valid defenses had lately been discovered after arduous and diligent search.

Pomeroy's Equity Jurisprudence (4th Ed.), Vol. 2, pp. 1921 and 1922.

3 Freeman on Judgments (5th Ed.), pp. 2520 and 2523. Also Sec. 1234, pp. 2571 and 2572.

Eighth. Section XV of petitioners' said answer set up that the federal tax foreclosure decrees were void also because the records made in said tax foreclosure proceedings were predicated upon former state decrees which were in turn void for matters appearing upon the face thereof.

Inter-River Drainage Dist. v. *Henson,* (Mo.) 99 S. W. 2d 865, 8th and 9th headnotes and supporting text.

1 Freeman on Judgments (5th Ed.), Sections 322 and 382.

Section XVIII of petitioners' answer (R. 213) together with prior sections presented a chain of facts and circumstances which made it inequitable and unscionable for the Drainage District to come forward as actor-plaintiff-claimant and maintain its fee title claim to the awards for these four parcels. To begin with, Section IV of the answer (R. 94) showed that the original state decree quoted R. 89 to 102 was void and ineffective to include these lands in the District. That is a question of state law now pending but not yet decided by the state courts.

Section V of the answer (R. 104) showed that the area of these lands was in one of four separate and distinct watersheds and that it was not consistent with due process or equal protection to enforce common burdens on these lands for large amounts of money spent or wasted in other unrelated watersheds. That question is pending in the state courts and undetermined.

Section VI of the answer (R. 112) showed that the notice quoted (R. 113) was inadequate to give the state court jurisdiction to confirm any assessments of benefits.

That question is pending in the state courts and undetermined. That question goes to the root of the whole matter for if there was no legal confirmation of assessments then there was never any legal tax of any sort levied against these lands.

Section VII (R. 118) showed that the pretended assessments of benefits as applied to these lands were so arbitrary, unreasonable and in violation of state law as to amount to a fraud upon the owners of these lands—$35 to $40 per acre as assessed benefits on swamp lands which obviously would be damaged and never benefitted by the proposed improvements. The jury found these same lands to have a value of $5 per acre.

Sections VIII and IX of the answer (R. 127 and R. 130) showed no legal levy of any total tax and no legal levy of any instalment tax because essential requirements of the original decree undertaking to form a District were lacking, making it impossible to follow the statute in making such levies. Those questions are further matters of state law now pending and undetermined by the state courts.

Section X (R. 134) showed many reasons for no legal maintenance tax, especially as applied to these lands, because improvements originally proposed were abandoned. Hence, no original construction and no maintenance. Moreover, pretended levies for maintenance were in part collected and then diverted to the payment of attorney's fees and costs in the receiver's tax suits, yet the District's claim of title is in part predicated upon that sort of pretense, illegality and fraud.

Section XI (R. 141) showed that the major part of the first bond issue got out as payment to contractors for work done under contracts that were illegal because not let by competitive bidding and void also because collusive and fraudulent. The same section shows changes, amendments

and abandonments in the plans of reclamation, all without any pretense of complying with the state law in that behalf.

Section XII (R. 151) showed that the second and third bond issues were both wholly illegal and fraudulent because predicated upon the illegal contracts above mentioned and predicated upon the illegal changes and amendments to the plans of reclamation. Also that said bonds were issued to contractors for work and money wasted in other watersheds. Those bond issues and also the first were all nonnegotiable bonds under the decisions of the Supreme Court of Florida such as

First State Sav. Bank v. *Little River Drainage Dist.*, 122 Fla. 304, 165 So. 48, and

State v. *Crandon*, 115 Fla. 153, 155 So. 667.

and Sections 6761 and 6763, Compiled General Laws of Florida, being parts of our Negotiable Instruments Law. To like effect are decisions of other states.

State v. *Little River Drainage Dist.*, (Mo.) 68 S. W. 2d 671.

Manker v. *Am. T. Co.*, (Wash.) 230 Pac. 406, 42 A. L. R. 1021.

Galt v. *City of Chicago*, (Ill.) 42 N. E. 2d 115.

Nevertheless installment taxes were annually levied from 1919 and 1920 to date of taking to service those void bond issues and such taxes are in part the basis of the fee title claim of the Drainage District now asserted with respect to the parcels of land in question.

Section XVIII-A of the answer (R. 210) showed that the illegalities and frauds described in Sections XI and XII of the answer were covered up by the Supervisors, the receiver and his counsel. That they were concealed during the tax foreclosure suits and that the mortgage trustees who were made parties along with Duval Cattle Company were prevented from finding out about those things so as to set them up as defensive matters.

Finally, Section XVIII of the answer (R. 213) showed that the Drainage District has suffered no injury or change of position by any delay. That it has paid no state and county taxes but beginning with 1937 it has received large royalties by way of rents on turpentine leases. That it has sold no lands because the state drainage law made it obligatory that it sell subject to all subsequent drainage tax levies. Hence no one would buy. When the government came along and took these lands for an air field then for the first time was it possible for anybody to get any money out of these lands. Upon the happening of that event the District and its majority bondholders J. W. Harrell (now of counsel for the District) and W. R. Schnauss, mentioned in the answer of petitioners (R. 216) and who bought up bonds at 5 cents to 10 cents on the dollar, come forward and claim the entire proceeds of these lands basing their claims on an alleged title derived from the long course of spoliation, illegality and fraud described in the answer of these petitioners. The decisions of the courts below failed to give any effect to the showing so made by the answer and in that behalf their decisions are probably in conflict with many decisions of this Court such as

Brownsville v. *Loague*, 129 U. S. 493, 32 L. Ed. 780.

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, 138 U. S. 552.

Arrowsmith v. *Gleason*, 129 U. S. 86, 101.

Marshall v. *Holmes*, 141 U. S. 597.

Simon v. *Southern R. Co.*, 236 U. S. 115.

Also decisions of other Circuit Courts of Appeal such as

National Surety Co. v. *State Bank*, (8 C. C. A.) 120 Fed. 593, 61 L. R. A. 394.

Such conclusion is likewise probably in conflict with decisions of our state Supreme Court such as

Edenfield v. *Sayre*, 81 Fla. 367, 88 So. 607.

Finally, Section XX of petitioners' answer (R. 222) set up that the final decrees in the tax foreclosure suits imposed sundry unconstitutional conditions of sale and redemption and that the Drainage District and its bondholders through the very title claim now asserted are attempting to reap the benefits thereof contrary to numerous decisions of this court in such cases as

Clark v. *Reyburn,* 8 Wall. 318, 19 L. Ed. 354.

Brine v. *Hartford Fire Ins. Co.,* 96 U. S. 627, 24 L. Ed. 858.

Municipal Investors Assn. v. *City of Birmingham,* (Mich.) 299 N. W. 90. Affirmed by this court 316 U. S. 153, 86 L. Ed. 1341.

The Drainage District attacked the answer of petitioners and others by two motions. One motion (R. 257) was a motion to strike the answer in its entirety and as to all parties filing the same. The other motion (R. 263) was a motion to enjoin Nellie C. Bostwick and Jacksonville Heights Improvement Company from

> "claiming or attempting to claim any right, title or interest in the funds deposited by the United States as consideration for the taking of lands which were conveyed to Baldwin Drainage District."

That is to say, lands purportedly conveyed to the Drainage District by special masters as a result of the federal tax foreclosure decrees obtained by the receiver Hemphill.

The petitioners and others who had joined them in their said answer filed a motion (R. 265) asking that the court defer disposition of the motions filed by the Drainage District because the questions of state law and federal law were interwoven and interdependent and that the questions of state law raised by Sections II to XIII inclusive of said answer were then pending in a suit filed in the state circuit court.

While those said motions were pending a jury was called and made awards for all of the forty-two parcels in suit (R. 273). By consent of counsel the adverse claims of title were left for subsequent determination.

On July 16th, 1942, the District Court made two orders and one order (R. 274-275) was to the effect that the legal questions raised by petitioners' said answer, Sections II to XIII, inclusive, be postponed until the further order of the court because substantially the same questions were then pending before the state circuit court and had

> "not heretofore been settled by the Supreme Court of Florida."

The other order of the same date (R. 276, 282) treated the motion of the Drainage District for injunction as a motion for judgment on the pleadings and thereupon entered what amounted to a declaratory decree in favor of the Drainage District and adjudging its title to Parcels 4, 5, 15 and 24 derived through the former tax foreclosure decrees to be good and unassailable by anything set up in the answer of these petitioners.

Appeals were taken from that decree (R. 347-349) and on January 22nd, 1943, an affirming opinion was rendered by the Circuit Court of Appeals (R. 381 to 390) followed by an affirming judgment (R. 391).

The opinion of the Court of Appeals held in substance

First. That the original opinion of the district court reported as *Kreitmeyer* v. *Baldwin Drainage Dist.*, 298 Fed. 604, and the order appointing a receiver April 28th, 1924, and containing a recital of jurisdiction, were *res judicata* on the subject of jurisdiction, as to existing landowners and all who might thereafter claim through them, even though the Drainage District was then the sole defendant and no landowner had yet been sued. That holding was probably in conflict with numerous decisions of this Court.

> *O'Brien* v. *Wheelock,* 184 U. S. 450, 481, 483, 46 L. Ed. 636, 651, middle second column, 652 lower part first column.

Ocean Beach Heights v. *Brown-Crummer Investment Co.*, 302 U. S. 614, 616-618, 82 L. Ed. 478, 480-481.

U. S. v. *Pink*, 315 U. S. 203, 216, 86 L. Ed. 796, 810, 2nd headnote.

Proceeding from the premise last stated, the Court of Appeals next held that the petitioners' attacks on jurisdictional grounds and on grounds of fraud and mistake were all collateral attacks which could not succeed. Here again the opinion was probably in conflict with many precedents from this Court such as

Thompson v. *Whitman*, 18 Wall. 457, 21 L. Ed. 897.

Reynolds v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464.

Old Wayne Mutual Life Assn. v. *McDonough*, 204 U. S. 8, 20, 51 L. Ed. 345, 350.

Simon v. *Southern R. Co.*, 236 U. S. 115, 59 L. Ed. 492.

Adam v. *Saenger*, 303 U. S. 59, 62, 82 L. Ed. 649, 652.

Said conclusion that the attacks were collateral in character is apparently in conflict with decisions of other Circuit Courts of Appeal such as

Seay v. *Hawkins*, (8 C. C. A.) 17 F. 2d 710.

The conclusions thus stated in the opinion of the Court of Appeals as to *res judicata* and collateral attack prevented any decision on the merits of the jurisdictional questions raised by the answer of these petitioners and stated above beginning page 3. It is our belief that the opinion of the Court of Appeals is erroneous for other causes stated in the petition for rehearing (R. 392 to 401).

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, now 28 U. S. C. A., Sec. 347. The decree of the Circuit Court of Appeals was filed January 22nd, 1943 (R. 381). Petition for rehearing was filed February 8th, 1943 (R. 392) and same was denied February 12th, 1943 (R. 402). Application for stay order was filed February 25th, 1943 (R. 403), and an order was made on the same date (R. 406) staying the mandate of the court for a period of thirty days to permit filing of a petition for certiorari with accompanying record and if so filed until final disposition of the case by this Court. That this petition is being filed within the thirty days so allowed by said order and much less than three months after the date of said opinion and later order denying petition for rehearing. That the decree of said district court entered July 16th, 1942, affirmed by the Court of Appeals as aforesaid had such finality as to support said appeals and as to warrant writ of certiorari pursuant to this petition.

Reeves v. *Beardall*, 316 U. S. 283, 86 L. Ed. 1478.

QUESTIONS PRESENTED.

Upon the record and the opinion of the Court of Appeals as above explained several important federal questions are presented as follows:

A.—IS IT CONSISTENT WITH THE "LAW OF THE LAND" AND "DUE PROCESS" THAT LANDOWNERS BE HELD SUBJECT TO THE DOCTRINE OF *RES JUDICATA* BY A RECITAL OF JURISDICTION IN AN ORDER APPOINTING A RECEIVER WHERE SUIT WAS FILED AGAINST A TAXING DISTRICT AS SOLE DEFENDANT AND NO LANDOWNER HAD YET BEEN SUED?

The opinion of the Court of Appeals (R. 381, *et seq.*) answered this question in the affirmative. The recital of jurisdiction quoted in the opinion (R. 385) was taken from the order appointing the receiver and this fact was pointed out to the Court of Appeals by the second ground of the petition for rehearing (R. 393).

B.—MAY OWNERS OF LAND CLAIMED TO BE WITHIN A TAXING DISTRICT CONTEST ADVERSE CLAIMS OF TITLE WHERE SUCH ADVERSE CLAIMS ARE PREDICATED UPON ORDERS AND DECREES PREVIOUSLY ENTERED IN THE SAME COURT AND THE RECORDS IN SUCH FORMER PROCEEDINGS *SHOW ON THEIR FACE* THAT THE COURT WAS WITHOUT JURISDICTION?

In answering this question does it matter whether such contests on such ground be defined as a direct or a collateral attack?

The opinion of the Court of Appeals held that the recital in the order appointing the receiver closed the door upon these inquiries and that in consequence the attacks attempted by the petitioners were incompetent collateral attacks.

C.—CONCEDING THAT THE ORIGINAL BILL OF LOUIS KREITMEYER CITED R. 167 MADE A *PRIMA FACIE* CASE OF FEDERAL JURISDICTION DID THE ANSWER OF THE DRAINAGE DISTRICT THERETO QUOTED R. 168 TO 175 SETTING FORTH THE ATTITUDE AND INTERESTS OF THE DRAINAGE DISTRICT AND THE FACT THAT THE DISTRICT HAD ALREADY (R. 173) FILED A SUIT IN THE STATE COURT AGAINST DUVAL CATTLE COMPANY, OPERATE TO SHOW THAT THE DRAINAGE DISTRICT HAD THE SAME REAL INTERESTS AGAINST THE ALLEGED DELINQUENT LANDOWNERS AS DID THE COUPON HOLDER AND THAT THERE WAS IN FACT NO "CONTROVERSY" BETWEEN THE COUPON HOLDER AND THE DISTRICT SAVE A MERE MATTER OF REMEDY AS TO WHO SHOULD DO THE JOB OF SUING THE ALLEGED DELINQUENTS?

Did such a development by the answer defeat a *prima facie* showing of jurisdiction, if any, theretofore made by the bill and make it the duty of the district court under what is now Title 28, U. S. C. A., Sec. 80, to dismiss the bill?

The opinion of the Court of Appeals did not answer these questions except by holding that the recital in the order appointing a receiver was *res judicata* as to landowners not yet sued.

D.—DID THE PETITION OF LOUIS KREITMEYER QUOTED R. 177 TO 184 AND A LIKE PETITION BY THE INTERVENER WARREN E. BROWN, BOTH OF WHICH WERE FILED AFTER THE RECEIVER WAS APPOINTED BUT BEFORE HE SUED ANY LANDOWNER, HAVE THE EFFECT BY THE DISCLAIMERS CONTAINED THEREIN OF ELIMINATING ANY SUBSTANTIAL CONTROVERSY BETWEEN THE COMPLAINING BOND HOLDER AND THE DRAINAGE DISTRICT, WITH THE RESULT THAT FEDERAL JURISDICTION, IF ANY PRE-

VIOUSLY EXISTED, THEREUPON DISAPPEARED?

If any "controversy" was left after the complaining bond holders got the order quoted (R. 184) designating their attorneys as the attorneys to act for the receiver did such remaining controversy involving merely an election to proceed under what is now Section 1493, Compiled General Laws of Florida, instead of under what is now Section 1475, Compiled General Laws of Florida, have a value or amount sufficient to sustain federal jusrisdiction?

The Court of Appeals left these questions unanswered save by application of the doctrine of *res judicata* in the manner already stated.

E.—DID WHAT ARE NOW SECTIONS 1473 AND 1493, COMPILED GENERAL LAWS OF FLORIDA, PROVIDING TWO METHODS BY WHICH A COMPLAINING BONDHOLDER COULD ENFORCE A DISTRICT CAUSE OF ACTION FOR DELINQUENT DRAINAGE TAXES PLUS THE FORMS OF FINAL DECREES ENTERED IN THE RECEIVER'S TAX CASES AS QUOTED R. 187 TO 191 DEMONSTRATE THAT FROM THE OUTSET OF THE FORMER TAX LITIGATION THE DRAINAGE DISTRICT, A FLORIDA CORPORATION, HAD THE SAME INTERESTS AND WAS ALIGNED ON THE SAME SIDE WITH THE BOND HOLDERS ALL ADVERSE TO DUVAL CATTLE COMPANY, JACKSONVILLE HEIGHTS IMPROVEMENT COMPANY AND OTHER CITIZENS OF FLORIDA ALLEGED TO BE DELINQUENT PROPERTY OWNERS?

All these things appeared on the face of the former records but the Court of Appeals attached no importance thereto.

F.—DID THE RECEIVER'S BILL AND ITS EXHIBITS FILED AGAINST JACKSONVILLE

HEIGHTS IMPROVEMENT COMPANY AND QUOTED R. 282 TO 304 SEEKING TO COLLECT ONLY "ANNUAL INSTALMENT TAXES" FOR DEBT SERVICE PURPOSES, PURPORTEDLY LEVIED UNDER WHAT IS NOW SECTION 1468, COMPILED GENERAL LAWS, 1927, GIVE THE COURT JURISDICTION, UNWITTINGLY, AS SHOWN BY HIS FINDINGS (R. 309 to 314) TO ENTER A DECREE (R. 315 to 322) WHICH IN FACT FOR MORE THAN A ONE-SIXTH PART INCLUDED VOID PRETENDED "MAINTENANCE TAXES" SUPPOSEDLY LEVIED FOR MAINTENANCE PURPOSES PURSUANT TO WHAT IS NOW SECTION 1496, COMPILED GENERAL LAWS OF FLORIDA, 1927?

The Court of Appeals made no answer to this question save to note on page 5 of the opinion (R. 385) that thirteen years had elapsed since the suit was started by the receiver against Jacksonville Heights Improvement Company and that the company had not paid

> "or offered to pay the taxes for which the lands were sold or any of the taxes which were thereafter regularly assessed on the lands by the district."

whereas this holding assumed as against all that was alleged in Sections II to XIII of petitioners' answer that all the drainage taxes of every nature levied before the suit or since as against these lands were valid. The district court by the order (R. 275) had put aside all these attacks on the taxes as such to await state court action and no cross appeal was taken on that order.

G.—WAS THE DECREE IN THE *DUVAL CATTLE COMPANY CASE*, 41 F. 2d 433, *RES JUDICATA* AS TO MRS. BOSTWICK?

The Court of Appeals undertook to answer this question in the affirmative, pages 8, 9 and 10 of the opinion (R. 388 to 390). We believe the reasoning of the court is illogical and unsound. As to this we will say more in the appended brief.

II.—IF THE MORTGAGE TRUSTEES MADE DEFENDANTS IN THE DUVAL CATTLE COMPANY CASE REPRESENTED MRS. BOSTWICK FOR ALL PURPOSES FIRST AS A MORTGAGE BONDHOLDER BENEFICIARY AND SECOND AS FEE OWNER, INCLUDING HER RIGHTS OF REDEMPTION, MIGHT THEY OR MAY SHE ATTACK THE TAX FORECLOSURE DECREE FOR FRAUD OR MISTAKE IN THAT THE DISTRICT SUPERVISORS, THE RECEIVER AND HIS COUNSEL EITHER BY DESIGN OR MISTAKE PREVENTED THE MORTGAGE TRUSTEES FROM INTERPOSING GOOD DEFENSES SUCH AS THE MATTERS COMPLAINED OF IN SECTIONS XI AND XII OF PETITIONERS' ANSWER, WHICH MATTERS WERE ONLY LATELY UNCOVERED AFTER DILIGENT SEARCH?

The opinion of the Court of Appeals wholly omits to give any answer to this question though it was specifically raised by Section XVII-A of the answer and argued by brief.

I.—IF THE RECORDS MADE IN THE HEMPHILL TAX SUITS SHOW ON THEIR FACES THAT THE DECREES THEREIN WERE PREDICATED UPON STATE COURT DECREES, WHICH STATE COURT DECREES WERE IN TURN VOID ON ACCOUNT OF MATTERS APPEARING UPON THEIR FACES OR APPEARING UPON THE FACES OF THE RECORDS WHEREIN ENTERED, DO SUCH FEDERAL TAX DECREES FALL WITH THE STATE DECREES?

This question was propounded by Section XV of the answer and argued by brief, but the Court of Appeals left it unanswered. This is another matter where the federal question is interwoven with state questions now pending before the state court. If the state court now holds that the state court decrees complained of in Sections IV and VI of petitioners' answer (R. 94 and 112)

were void for reasons stated in those two sections, then what is left for the federal tax foreclosure decrees to rest upon?

J.—DOES THE ANSWER OF PETITIONERS POINT OUT, BY SECTIONS IV TO XIII INCLUSIVE AND BY SECTIONS XVII AND XVII-A, SUCH A CHAIN OF FACTS AND CIRCUMSTANCES AS MAKE IT INEQUITABLE AND UNCONSCIONABLE FOR THE DRAINAGE DISTRICT AND ITS BONDHOLDERS NAMED IN THE ANSWER (R. 216) TO RETAIN THE BENEFIT OF THE FEE TITLE CLAIMED BY THE DISTRICT?

This question is dealt with by one paragraph on page 8 of the opinion (R. 388). We think the reasoning of the Court of Appeals was erroneous and the point will be briefly discussed in the appended brief.

K.—DID THE FINAL DECREES OF TAX FORECLOSURE EXCEED THE JURISDICTION OF THE FEDERAL COURT, IF JURISDICTION EXISTED FOR ANY PURPOSE, BECAUSE OF THE INCLUSION OF UNCONSTITUTIONAL CONDITIONS OF SALE AND REDEMPTION?

This question was left unanswered by the Court of Appeals though presented by Section XX of petitioners' answer.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First. Question A, propounded page 15, *supra*, shows how the Court of Appeals decided and applied the doctrine of *res judicata* in this case. The decision of the court on that point is in conflict with applicable decisions of this Court, such as *O'Brien* v. *Wheelock, Ocean Beach Heights* v. *Brown-Crummer Investment Co.*, and *U. S.* v. *Pink*, cited *supra*. Also *Kersha Lake Drainage Dist.* v. *Johnson*, 309 U. S. 485, 494, 84 L. Ed. 881, 887.

Second. Question B, stated page 15, *supra*, was decided by the Court of Appeals in a manner probably in conflict with applicable decisions of this court, such as *Thompson* v. *Whitman* and other cases cited immediately following the citation of that case, page 13, *supra*.

Third. Questions C, D and E, stated pages 16 to 17, *supra*, were left undecided by the Court of Appeals except by the general conclusion found in the opinion that the petitioners, appellants below, had not shown from the face of the former records that the court was without jurisdiction, but this general conclusion was predicated upon the premise that there was a recital or holding of jurisdiction contained in the order appointing the receiver when the Drainage District was the sole defendant. Such a conclusion is probably in conflict with applicable decisions of this Court, such as *Indianapolis* v. *Chase National Bank, supra, Blacklock* v. *Small, supra*, and *Healy* v. *Ratta, supra*. Moreover, questions C, D and E are important questions of federal law as to which lower federal courts should have definite guidance. Otherwise the dominant policy referred to in the case of *Indianapolis* v. *Chase National Bank*, and defined by successive acts of Congress with respect to diversity of citizenship will not be uniformly enforced.

Fourth. Question C, stated page 16, *supra*, raises an important federal question which apparently has not been but should be settled by this Court. That is to say, when the face of a former record made in the federal court shows that the "object of the suit" is the right to pursue a particular remedy rather than some other remedy equally efficacious, is the amount or value of the right to pursue the chosen remedy the test of federal jurisdiction rather than the amount of bonds or coupons which the complaining party has brought or could bring into the litigation? The principles laid down in *Healy* v. *Ratta, supra, McNutt* v. *General Motors Acceptance Corporation, supra,* and *Thomson* v. *Gaskill, supra,* should be applicable in a solution of this question but we have found no decision of this Court that squarely undertakes to determine jurisdiction by the value to the litigant of the particular remedy he has chosen as distinguished from another remedy equally efficacious or presumed to be equally efficacious. In our appended brief we have quoted material parts of what are now Sections 1473 and 1493, Compiled General Laws of Florida, in order to compare the two remedies which were available to Kreitmeyer, the complaining bond holder, and we will point out that under the one defined by Section 1473 a federal court plainly would have no jurisdiction. Also that the remedy under Section 1493 amounts to the same in substance.

Fifth. Question F, stated page 17, *supra*, was decided by the Court of Appeals in a manner probably in conflict with applicable decisions of this court, such as *Gage* v. *Pumpelly* and *Reynolds* v. *Stockton, supra.*

Sixth. Question G, stated page 18, *supra*, raises an important question of state law and was decided by the Court of Appeals in a way probably in conflict with state rules and state Supreme Court decisions, such as *Griley* v. *Marion Mortgage Co.*, 132 Fla. 299.

Seventh. Question H, stated page 19, *supra*, raises an important federal question. Namely, the validity of a

federal decree when procured by fraud, mistake or concealment, and the question was determined by the Court of Appeals in a manner probably in conflict with applicable decisions of this Court, such as *Simon* v. *Southern Railway*, 236 U. S. 115, and in conflict with eminent text writers such as 2 Pomeroy, pages 1921 and 1922, and 3 Freeman, pages 2520 and 2523, 2571 and 2572, cited *supra*.

Eighth. Question I, stated page 19, *supra*, points out inability of a federal court by its decree to give life and vitality to what were "dead limbs" on the state judicial tree. 1 Freeman on Judgments (5th Edition), Section 322.

Ninth. Question J, stated page 20, *supra*, invokes the inherent power of a federal court of equity to prevent an inequitable and unconscionable use of its own former decrees. The Court of Appeals' decision on this point is probably in conflict with applicable decisions of this Court such as

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, 138 U. S. 552.
Arrowsmith v. *Gleason*, 129 U. S. 86.
Marshall v. *Holmes*, 141 U. S. 597.
Simon v. *Southern Ry.*, 236 U. S. 115.

Tenth. Question K, stated page 20, *supra*, was left unanswered by the Court of Appeals. That question propounds an additional reason why the former tax foreclosure decrees went beyond the jurisdiction of the court and hence should be vacated.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be named therein the full and complete transcript of the record and all proceed-

ings in the case numbered on its docket No. 10462 and entitled Nellie C. Bostwick *et al.* v. Baldwin Drainage District *et al.*, and that the decree of said United States Circuit Court of Appeals in said cause be reversed by this Court and that petitioners have such other and further relief in the premises as to this Court may seem just.

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